

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOUIS H. CAMPBELL and FEDERAL EMERGENCY  
MANAGEMENT AGENCY, Denton, TX

*Docket No. 01-587; Submitted on the Record;  
Issued December 26, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating an overpayment in compensation in the amount of \$13,788.72 and that, therefore, he was not entitled to waiver.

On June 1, 1998 appellant, then a 50-year-old training specialist, sustained an employment-related right shoulder and arm sprain while lifting a box at work. He stopped work that day, returned to light duty on September 8, 1998 and worked for one and a half days. Appellant received appropriate continuation of pay and compensation and was placed on the periodic rolls. He returned to work on March 25, 1999, worked three days and resigned effective March 29, 1999. The record reflects that appellant resigned because the employing establishment would not grant him a leave of absence for a personal trip to the Philippines.

By letter dated August 15, 2000, the Office informed appellant that it had made a preliminary determination that he had received an overpayment in compensation in the amount of \$13,788.72 for the period March 25 to September 11, 1999. The Office stated that it had found appellant at fault in the creation of the overpayment because he knew or should have known that he was not entitled to compensation after his return to work. The Office requested that appellant indicate on an attached Office form whether he wished to contest the existence or amount of the overpayment or the fault determination.<sup>1</sup> The Office also requested that he complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether appellant was entitled to waiver should he be found to be without fault and informed him that failure to submit the requested financial information within

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<sup>1</sup> The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and, (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

30 days would result in a denial of waiver of the overpayment. By decision dated November 29, 2000, the Office finalized the overpayment determination, noting that appellant did not respond to the preliminary finding of fault.

The Board finds that appellant received an overpayment in compensation in the amount of \$13,788.72 for the period March 25 to September 11, 1999.

The record in this case shows that the Office paid appellant compensation totaling \$13,788.72 for the period March 25 to September 11, 1999. Benefits are available only while the effects of the work-related condition prevent an employee from his previous employment<sup>2</sup> and in this case appellant returned to work on March 25, 1999 and resigned three days later for personal reasons. He was, therefore, not entitled to compensation for any subsequent period.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment in compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>3</sup>

Section 10.433(a) of the Office's regulation provides:

"[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."<sup>4</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. The Office has the burden of proof in establishing that appellant was at fault in helping to create the overpayment.<sup>5</sup> In determining whether a claimant

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<sup>2</sup> 20 C.F.R. § 10.500(a) (1999).

<sup>3</sup> 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>4</sup> 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB \_\_\_\_ (Docket No. 00-607, issued January 23, 2001); *see also* 20 C.F.R. § 10.430.

<sup>5</sup> *Danny L. Paul*, 46 ECAB 282 (1994).

is at fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.<sup>6</sup> Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.<sup>7</sup> Thus, an individual will be found to be at fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of benefits.<sup>8</sup> The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment, which he or she knew or should have expected to know he or she was not entitled.<sup>9</sup>

In the instant case, the Board finds that appellant should have been aware that he was not entitled to continue to receive compensation after returning to work. By letter dated August 12, 1998, the Office informed him regarding his accepted conditions. In the same letter, he was also informed that he was to notify the Office "right away" upon his return to work. When appellant was placed on the periodic rolls on December 16, 1998, the Office again informed him that benefits were payable only while he was unable to work due to his employment injury. He was to inform the Office immediately upon his return to work. Therefore, once he had returned to work, upon receipt of any continued compensation, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. The record does not indicate that appellant pursued an inquiry.<sup>10</sup>

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<sup>6</sup> *Stephen A. Hund*, 47 ECAB 432 (1996).

<sup>7</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> *See Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>10</sup> The record indicates that he has a Ph.D.

For these reasons, the Board finds that under the circumstances of this case the Office properly found that appellant reasonably knew or should have known that he was not entitled to continue to receive compensation following his return to work on March 25, 1999. Appellant was, therefore, at fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$13,788.72 is not subject to waiver.<sup>11</sup>

The November 29, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
December 26, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member

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<sup>11</sup> On appeal, appellant contends that a request for leave-buy-back was not considered in the overpayment decision. In a typical leave-buy-back case, an injured employee uses sick or annual leave to prevent wage loss after an employment injury. If a claim is accepted and the work absences would otherwise be compensable under the Act, the employee may wish to buy back this leave from the employing establishment. An employee may decide to take sick and/or annual leave in order to avoid possible interruption of income. If such employee does so decide and his or her claim for compensation is subsequently approved, such employee may arrange with his or her employing establishment to "buy back" the leave used and have it reinstated to such employee's account. The compensation to which the employee is entitled, may be used to pay a part of the "buy back" cost and the employee shall be obligated to pay the balance. No compensation payments shall be paid, however, while the employee is still in leave status. Arrangements to "buy back" leave, shall be made with the employing establishment. *James R. Rowell*, 39 ECAB 869 (1988). In the instant case, a Form 7b, signed by appellant on February 23, 1999, indicated that he elected to reimburse the employing establishment \$1,139.83 from continuing compensation benefits. The record further indicates that by letter dated October 25, 2000, the Office accepted that appellant's condition was updated to include the diagnoses of right tardy ulnar nerve palsy and impingement syndrome at the right shoulder with secondary supraspinatus tendinitis. Surgery was authorized.